IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.872 OF 2001

DIST. MUMBAI

1. Nisar Ahmed @ Matya Mohd. Yasin)
   Ansari)
2. Sajidali Nisar Ahmed Ansari)
3. Mohd. Javed @ Banti Nisar Ahmed)
   Ansari, all accused residing at)
   8/1758, Durga Seva Sangh,)
   Govandi, Mumbai – 400 043 (at)
   present in Yervada Central Prison).)..Appellants/Orig.Accused

Versus

The State of Maharashtra,)
(At the instance of Shivaji Nagar Police)
Station, C.R. No.85/98 and Sessions)
Case No.1332 of 1998).) ... Respondents

Mr. Vijay Desai for the appellants.

Mr. K.V. Saste, A.P.P. for the respondent-State.

CORAM : SMT. RANJANA DESAI & D.G. KARNIK, JJ.

DATE ON WHICH THE JUDGMENT RESERVED : 2ND MAY, 2006.

DATE ON WHICH THE JUDGMENT PRONOUNCED : 5TH MAY, 2006.

JUDGMENT : (Per Smt. Ranjana Desai, J.)

1. The appellants (orig. accused 1, 2 and 3) (for convenience, "A-1", "A-2" and "A-3"respectively) were tried in the Court of Additional Sessions Judge, Mumbai in Sessions Case No.1332 of 1998 for offence punishable under section 302 read with section 34 of the Indian Penal Code (for short, "the IPC").

2. It will be advantageous to give the gist of the prosecution case. Complainant PW-1 Basharat Ali had three sons viz. PW-13 Mubarak Ali, Nawab Ali and Soharab Ali. Soharab Ali was also known as Mannan (at some places also referred to as "the deceased"). Mannan was living separate from his parents with his wife PW-6 Zarinabanu and five children. PW-1 Basharat Ali was living in a room on Plot No.7 and Mannan was living on Plot No.8 in Room No.101. PW-1 Basharat Ali was running a flour mill and Mannan was running a pan shop. According to the prosecution, Mannan used to sell gard

powder and charas and, therefore, he was not attending to his pan shop regularly.

3. A-1 is the father of A-2 and A-3. A-1, A-2 and A-3 were from the same locality and known to the Complainant PW-1 Basharat Ali's family. A-2 and A-3 were doing the work of embroidery at a factory. A-1 used to sell gard and charas. His sons A-2 and A-3 used to help him in that business. Mannan came in contact with the accused and he also started doing the same business. Some dispute had arisen between the accused and Mannan in connection with the said business.

4. According to the prosecution, on 20/8/1998 at about 6.30 p.m. PW-3 Hasan Ali had seen A-1 abusing Mannan in filthy language near the spot where he had parked a hand cart. PW-3 Hasan Ali had seen one knife with A-1. At about the same time, A-2 had gone to the house of Mannan. Mannan was not at home. A-2 made enquiry with his wife PW-6 Zarinabanu about Mannan. When Mannan returned home, PW-6 Zarinabanu told him that A-2 had called him. Mannan left the house to see A-2. At Plot No.9 inside the public toilet, he met the accused. There was a quarrel between the accused and Mannan. Mannan was attacked by the accused with knives and gupti. PW-4 Mahendra, PW-14 Badruddin and PW-15 Sayyed were passing by the

public toilet. PW-10 Siddiq a boy of 14 years was also sitting in a jeep parked in front of the public toilet. All these persons heard somebody shouting "*Bachav, Bachav*". They had gone to see what had happened. They saw the accused assaulting Mannan with gupti and knives. The accused were then seen running towards Plot No.8 i.e. Durga Seva Sangh. Mannan had fallen in a pool of blood. PW-6 Zarinabanu, the wife of Mannan, the mother of Mannan and PW-1 Basharat Ali, the father of Mannan rushed towards the scene of offence. Mannan was removed in an injured condition to Shatabdi Hospital in an auto rickshaw. PSI Bhoi, who was on duty at Shivaji Nagar Police Station, got a message that Mannan was brought to Shatabdi Hospital in an injured condition. PSI Bhoi informed PW-16 PI Hargude that Mannan was dead even before he was brought to the hospital. PW-16 PI Hargude and PSI Bhoi along with other police staff went to the hospital. Mannan' srelatives were present at the hospital. PW-1 Basharat Ali lodged his complaint, which is at Ex-11. The said complaint was treated as FIR. Investigation was started on the basis of the said FIR. A-1 was arrested on 30/8/1998. A-2 was arrested on 11/9/1998 and A-3 was arrested on 29/8/1998. After completion of investigation, the accused came to be charged as aforesaid.

5. In support of its case, the prosecution examined as many as 16

witnesses. The prosecution examined four eye-witnesses. They are PW-4 Mahendra, PW-10 Siddiq, PW-14 Badruddin PW-15 Sayyed. The prosecution also examined PW-13 Mubarak, the brother of Manann, PW-1 Basharat Ali, the father of Mannan and PW-6 Zarinabanu, the wife of Mannan. PW-11 Dr. Shinde, who had done the post-mortem on the deceased has proved the post-mortem notes. Details of investigation are given by PW-16 PI Hargude. The defence of the accused was one of denial. According to the accused, they are falsely implicated on account of business rivalry. After perusing the evidence on record, the learned Sessions Judge convicted the accused under section 302 read with section 34 of the IPC and sentenced them to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/-. It is the said judgment and order which is challenged in the instant appeal.

6. We have heard, at some length, Mr. Desai, the learned counsel appearing for the appellant-accused and Mr. Saste, the learned A.P.P. appearing for the respondent-State. With the assistance of the learned counsel, we have gone through the evidence and the record.

7. Mr. Desai, the learned counsel for the appellants contended that the evidence on record clearly indicates that there was total darkness near the lavatory. Hence, the alleged eye-witnesses could

not have seen the incident in question. He submitted that the evidence of the eye-witnesses does not inspire confidence. PW-4 Mahendra has turned hostile. Therefore, his evidence is of no use to the prosecution. PW-10 Siddiq has stated that he was sitting inside the jeep which was in front of the public toilet. However, PW-13 Mubarak has stated that it was not possible to bring a rickshaw upto the point of the toilet due to narrow access. Therefore, a jeep could not have been parked in front of the public toilet. Mr. Desai pointed out that PW-10 Siddiq has stated that he had gone inside the toilet. But, he has not stated so before the police. Besides, he had not stated anything about the presence of A-2. Therefore, the presence of this witness at the scene of offence is doubtful. Mr. Desai further pointed out that PW-14 Badruddin has stated that there was no bulb inside the toilet and he was ten steps away from the public toilet. Moreover, there are contradictions as regards type of weapons used by the accused in the evidence of this witness and the evidence of PW-15 Sayyed. So far as PW-15 Sayyed is concerned, Mr. Desai pointed out that he had stated that on 20/8/1998 he was relieved from his work at about 7.30 p.m. According to him, he came back to his house and was in his house at 8.30 p.m. Mr. Desai contended that if it was so, there was no question of his going to the karkhana at 8.30 p.m. His story that when he was going to karkhana at 8.30 p.m., he heard the deceased screaming is doubtful. His presence at

the scene of offence itself is doubtful. Therefore, no reliance can be placed on his evidence. Mr. Desai further pointed out that the trial court has held that motive is not proved. He submitted that in the circumstances, the impugned order of conviction and sentence be quashed and set aside.

8. Mr. Saste, the learned A.P.P. contended that minor discrepancies in the evidence of eye-witnesses should not be unnecessarily magnified. He contended that on the basic story of the prosecution, all the eye-witnesses are consistent and they should be believed. He submitted that besides, at the instance of the accused, blood stained weapons and blood stained clothes worn by them have been recovered. The blood on these articles is of the same group as that of the blood of the deceased. This is a clinching circumstance which reinforces the prosecution case. The learned A.P.P. submitted that therefore, no interference is necessary with the impugned judgment and order.

9. PW-11 Dr. Shinde, who had done the post-mortem on the deceased found 14 external injuries on the deceased out of which 13 were incised stab wounds. PW-11 Dr. Shinde opined that the cause of death is haemorrhage and shock due to multiple incised stab wounds by sharp edged weapon or weapons.

10. It appears that the accused and the deceased were dealing in narcotics. PW-3 Hasan Ali has stated that A-1 used to sell gard. PW-10 Siddiq has stated that he had seen the deceased and A-1 quarrelling with each other. The deceased was demanding “mal” (goods) and A-1 stated that the deceased would not get any “mal” (goods). PW-1 Basharat Ali, the father of the deceased has stated that the accused were drug addicts. Therefore, it is possible that the accused and the deceased were dealing in drugs and the incident in question is the outcome of some dispute which had arisen in these dealings but as stated by the learned Sessions Judge, there is no conclusive proof of motive. However, since the prosecution has led evidence of eye-witnesses, absence of motive will not damage its case.

11. Before we go to the evidence of the eye-witnesses, it is necessary to refer to the evidence of PW-6 Zarinabanu, the wife of the deceased. According to PW-6 Zarinabanu on 20/8/1998 at about 5.00 p.m., A-2 had come to her house asking for the deceased. She told him that the deceased had gone to attend his duties. A-2 came again at 5.30 p.m. She told him the same thing. The deceased returned at about 6.00 p.m. She informed him that A-2 had come to the house to call him. Then the deceased told her that he would like to see A-2. He left the house at about 8.00 to 8.30 p.m. At about

9.00 p.m., her son Samsher Ali informed her about the incident. In the cross-examination of this witness, the defence has not been able to elicit anything which could persuade us to call her an unreliable witness. It is established therefore that on 20/8/1998 at about 8.00 to 8.30 p.m. the deceased had left his house to meet A-2.

12. It is also necessary to have a look at the evidence of PW-3 Hasan Ali. He is a fruit vendor. According to him, on 20/8/1998 at about 6.30 p.m., he had parked his fruit cart near the pan shop of the deceased. A-1 came there. He was wearing a banian and a lungi. He was abusing the deceased in filthy language. As he was abusing the deceased, he was pulling his lungi upto his waist. According to PW-3 Hasan Ali, at that time, he saw one knife at the waist of A-1. At about 9.00 p.m., he returned after taking a round. He saw the mother of the deceased crying and saying that A-1 had killed the deceased.

13. PW-10 Siddiq has stated that at about 8.00 p.m. or 8.30 p.m. he was sitting inside the jeep which was in front of the public toilet. They heard a shrill from inside the toilet. He and his friend went inside the toilet. They saw some quarrel taking place between three persons. He had seen A-1, A-3 and the deceased quarrelling inside the toilet. A-1 and A-3 were fighting with the deceased. The

deceased asked A-1 as to where he had kept the “mal” (goods). A-1 told him that he would not get any “mal” (goods). A-1 then abused the deceased in filthy language. A-1 asked the deceased to get out of the toilet stating that he has no business to stay there. According to PW-10 Siddiq, he had seen the accused and the deceased in the light which was coming from the adjoining houses. He has stated that thereafter, he went to see his father. He could not meet him and, therefore, he came back to his house. At that time, he saw that three to four persons had brought the deceased out of the toilet. This witness has been cross-examined at some length. In his cross-examination, two omissions have been brought on record. It appears that he has not stated before the police that he had seen the accused quarrelling with the deceased in the light which was coming from the adjoining house. However, he has stated in the cross-examination that there are chawls on the plots and their doors open on the opposite side of the toilets. Therefore, availability of light cannot be doubted. He had also not stated before the police that he had gone inside the toilet. We are of the opinion that these omissions do not affect the credibility of this witness. This witness does not claim to be an eye-witness. All that he says is that he had seen A-1 and A-3 fighting with the deceased. It was also contended that his claim that the jeep was standing in front of the toilet is false because PW-13 Mubarak has stated that it was not possible to bring a rickshaw upto

the point of the toilet due to narrow access. It is not the claim of PW-10 Siddiq that the jeep was taken upto the point of the toilet. It may be that the access upto the point of the toilet was narrow as stated by PW-13 Mubarak but that does not mean that a jeep cannot be parked in front of the toilet blocks obviously, outside the narrow access. Besides, PW-10 Siddiq has not stated that he saw the accused from the jeep. We are, therefore, unable to accept this criticism. From the evidence of PW-10 Siddiq, it can be said that the deceased, A-1 and A-3 were quarrelling near the public toilet at the relevant time.

14. PW-4 Mahendra has turned hostile. Hence, his evidence will have to be kept out of consideration. PW-14 is Badruddin. He was residing at the Lotus Colony at the relevant time. He was doing the work of embroidery at the karkhana. According to him, on 20/8/1998 at about 8.30 p.m. to 9.00 p.m. he was at the pan shop of Mr. Gupta. From the public toilet, he heard cries “Bachav, Bachav” . He along with others rushed inside the toilet. Inside the toilet, he saw A-1, A-2 and A-3 assaulting the deceased. A-1 and A-2 were assaulting the deceased with knives and A-3 was assaulting the deceased with a gupti. According to him, the accused were giving repeated blows on the chest and thigh of the deceased. Because of fear, he did not go ahead. The deceased fell on the floor. The accused ran away towards Durga Seva Sangh with weapons in their

hands. With the help of PW-13 Mubarak, PW-1 Basharat Ali and others, the deceased was removed to Shatabdi Hospital. According to him, he had informed the incident to PW-1 Basharat Ali and PW-13 Mubarak. This witness has been cross-examined. In the cross-examination, he has not deviated from what he has stated in the examination-in-chief. Evidence of this witness inspires implicit confidence.

15. PW-15 Sayyed also claims to have seen the incident. According to him, he was residing on Plot No.7 at Govandi, Bombay. He used to do the work of embroidery. A-3 was working with him. He also knows the other accused and the deceased. According to him, on 20/8/1998, he was going to his karkhana from his house. He heard the cries “Bachav, Bachav” from the public toilet on Plot No.9. He went towards the toilet. As he went towards the toilet, he saw the deceased being attacked and assaulted by A-1, A-2 and A-3. A-2 and A-3 were attacking the deceased with knives and A-1 was attacking him with a gupti. After the assault, the deceased fell on the ground and the accused ran towards Plot No.8. The deceased was then removed to the hospital.

16. In the cross-examination, he has stated that he used to work between 2.00 p.m. and 8.00 p.m. On 20/8/1998, he was relieved

from work at about 7.30 p.m. He came back to his house. He was in his house at about 8.30 p.m. If he had come to his house at 7.30 p.m. and was in his house at 8.30 p.m., there was no question of his going to karkhana at the time of the incident i.e. at 8.30 p.m. If after finishing his work, he had come home, he could not have gone back to his karkhana. Therefore, his claim that while he was going to his karkhana from his house, he heard the cries “Bachav, Bachav” from the public toilet, does not appear to be true. Besides while PW-14 Badruddin has said that A-1 and A-2 had knives in their hands, this witness has said that A-2 and A-3 had knives in their hands. While PW-14 Badruddin has said that A-3 had a gupti in his hand, this witness has said that A-1 had a gupti in his hand. We find it unsafe to rely on the evidence of this witness. But, from the evidence of PW-10 Siddiq, it can be safely concluded that A-1 and A-3 were quarrelling with the deceased on the relevant day at about 8.00 to 8.30 p.m. near the public toilet. Though PW-14 Badruddin' s evidence inspires confidence and he has said that A-1, A-2 and A-3 were assaulting the deceased with weapons, we find it difficult to hold that involvement of A-2 is conclusively proved. PW-10 Siddiq has stated that A-1 and A-3 were fighting with Mannan. According to him, the deceased had asked A-1 as to where the goods were and A-1 had said that he would not get the goods. He has said that A-1 abused the deceased in filthy language. He has also identified A-1

and A-3 in the court. PW-10 Siddiq has not given any role to A-2. It is, therefore, unsafe to hold that A-2 was involved in the assault on the deceased. We shall soon advert to the other reasons why we feel that A-2 cannot be convicted of the offence of murder.

17. PW-13 Mubarak is the brother of the deceased. He has stated that after coming to know about the incident in question, he had gone to Plot No.9 near the public toilet. With the help of 2 to 3 persons he shifted the deceased to Shatabdi hospital where he was declared dead. PW-1 Basharat Ali, the father of the deceased had stated that on 20/8/1998 at about 8.30 to 8.45 p.m., his wife came to his flour mill. She was crying. She told him that Mannan was murdered inside the toilet. He, therefore, went to the scene of offence. He saw the deceased lying in a pool of blood. With his son and others he took him to Shatabdi Hospital. At the Shatabdi Hospital, his complaint was recorded which is at Ex-11. It is treated as FIR. In this complaint, PW-1 Basharat Ali has given the names of all the three accused.

18. It was pointed out that PW-1 Basharat Ali has stated that just after 15 minutes his statement was recorded by the police when he was in the hospital and during those 15 minutes, he had no talk with anybody. It was argued that if PW-1 Basharat Ali had no talk with

anybody and since he had not seen the incident, obviously the names of the accused were supplied to him by the police. It is not possible to accept this submission. Though PW-1 Basharat Ali has said that he had no talk with anybody during this time, he has also said that during this time, he met with some people who were consoling him. Therefore, he must have come to know the names of the accused from the persons who were consoling him. In fact PW-14 Badruddin has stated that he had informed the incident to PW-1 Basharat Ali. In our opinion, there is nothing on record to establish that the police have manufactured the FIR. The FIR is lodged promptly.

19. Apart from the above evidence, the prosecution has also relied upon the evidence of discovery of weapons and clothes at the instance of the accused. PW-12 is Firoz. According to him, on 4/9/1998, A-1 made a statement that he would show them the weapons which he had kept in his house. At his instance, the police and the panchas went to the house of A-1. A-1 handed over one knife which was on a wooden cot. The knife was blood stained. The said knife was seized under panchanama. Ex-36 is the memorandum of statement and Ex-36-A is the said panchanama. In the cross-examination, this witness has stood firm. Therefore, discovery of blood stained knife (Article 5) at the instance of A-1 stands proved. According to the prosecution at the instance of A-2,

a blood stained knife (Article 2) was recovered. The pancha to this discovery is PW-9 Jamil. However, this witness has turned hostile and has not supported the prosecution. According to the prosecution at the instance of A-2, his clothes were recovered. According to the prosecution, there were no blood stains on the said clothes. However, the prosecution has not examined the panchas to prove this discovery. For this discovery, the prosecution is only depending on the evidence of PW-16 PI Hargude, the Investigating Officer. As PW-9 Jamil, the pancha to the discovery panchanama has turned hostile and since as regards clothes of A-2 the prosecution has not examined the panchas, we are not inclined to believe the alleged discovery of knife (Article 2) and clothes at the instance of A-2. The prosecution has then examined PW-8 Mohd. Zakir. According to him, on 7/9/1998, he was called to the police station. A-3 was present there. A-3 stated that he had concealed a weapon in his house and he is prepared to show that place. That statement was reduced in writing. It is at Ex-27. Pursuant to that statement, A-3 and the police and pancha went to his house in Lotus Colony at Shivaji Nagar, Bhivandi. A-3 handed over one gupti which was under the kitchen platform beneath a ladi. The gupti was blood stained. It was marked as Ex-4. It was seized under panchnama (Ex-27-A). The gupti was blood stained. According to PW-8 Mohd. Zakir, the gupti was sealed. This witness has not been cross-examined by the defence. Therefore,

discovery of blood stained gupti at the instance of A-3 stands proved. The prosecution has then examined PW-7 Vasant. He has stated that on 10/9/1998, he was called to the Shivaji Nagar Police Station. A-3 was present there. He made a statement that he had concealed the clothes which he had worn at the time of the incident, in the house of his grandfather. Memorandum (Ex-24) was recorded. At the instance of A-3 clothes were discovered from his grandfather' shouse. The clothes were seized under panchanama (Ex-24A). The said clothes were blood stained. In the cross-examination, he has denied that he is a professional pancha. There are no discrepancies in his evidence.

20. PW-5 is Noor Mohd. He is a pancha to panchanama (Ex-20) under which at the Shatabdi Hospital, clothes of the deceased were seized. He has stated that the clothes of the deceased were packed in brown colour paper wrapper. A label was put on it with the signatures of the pancha. The packet was then sealed with substance like wax. There is no challenge to this evidence because this witness has not been cross-examined.

21. The report of the chemical analyst (Ex-63) states that human blood of “B” group was found on the clothes of the deceased. On the knife (article 5) discovered at the instance of A-1, human blood was

found. However, its group could not be determined. On gupti (article 6), discovered at the instance of A-3, human blood was found. However its group could not be determined. On the clothes recovered at the instance of A-3, human blood was found. On the banian, blood of "B" group was found. According to the prosecution, full pant and full shirt discovered at the instance of A-3 belonged to him and lungi and banian belonged to A-1. However, there is no such classification made by A-3, but the fact remains that human blood was found on those clothes and one of them was stained with blood of "B" group, which is the blood group of the deceased. It is true that the blood group of the accused is not on record. However, it is not the case of the prosecution that in the incident in question, the accused were injured. Therefore, there is no question of their blood spilling on any of the articles. When the report of the chemical analyst was put to the accused in their statement recorded under section 313 of the Criminal Procedure Code, the accused have not offered any explanation. Finding of human blood on the weapons discovered at the instance of A-1 and A-3 and on the clothes discovered at the instance of A-3 is a clinching circumstance establishing their guilt.

22. In the ultimate analysis, therefore, we find that so far as A-2 is concerned, there is a variance in the evidence of the prosecution

witnesses about his role. While PW-14 Badruddin has stated that A-2 also assaulted the deceased, PW-10 Siddiq does not ascribe any role to him. He states that the quarrel was between the deceased and A-1 and A-3. The discovery of weapon and clothes at the instance of A-2 is not proved. PW-9 Jamil, the pancha has turned hostile. Therefore, panchanamas (Ex-58 and Ex-58A) cannot be relied on. So far as the discovery of clothes is concerned, panchas have not been examined. There is, therefore, no sufficient evidence on record to implicate A-2. He must, therefore, get the benefit of doubt. So far as A-1 and A-3 are concerned, the evidence on record indicates their complicity. PW-10 Siddiq has deposed about them. PW-14 Badruddin, the eye-witness has also stated that they assaulted the deceased. PW-14 Badruddin's evidence appears to us to be credible. It inspires confidence. PW-3 Hasan Ali, the fruit vendor says that he had seen A-1 abusing the deceased prior to the incident in question. The discovery of knife (article 5) at the instance of A-1 is proved. That knife was stained with human blood. Discovery of gupti (article 4) at the instance of A-3 is proved. Gupti (article 4) was found stained with human blood. Discovery of clothes at the instance of A-3 is proved. The clothes were blood stained. The banian recovered at the instance of A-3 was stained with blood of “B” group which is the blood group of the deceased. In the circumstances, we are of the view that the prosecution has proved the guilt of A-1 and A-3. It is true

that motive is not conclusively established. However, when there is cogent evidence of PW-14 Badruddin, who is an independent eye-witness, the fact that the motive is not conclusively established will have no adverse impact on the prosecution case.

23. Visibility can also not be doubted because though it has come on record that inside the toilet, there was no light, it is amply clear that the toilets were surrounded by rows of buildings which had lights. PW-2 Isak Petkar is the pancha to the scene of offence panchanama (Ex-13). He has stated that around the toilet, there were big houses. Besides, PW-14 Badruddin knew the accused as well as the deceased. Similarly PW-10 Siddiq also knew the deceased and the accused. Therefore, there is no possibility of mistaken identity.

24. It was argued that the prosecution witnesses have said that the accused were handcuffed when they made the statement that they would show weapons and clothes concealed by them and, therefore, this discovery is not voluntary. The police coerced the accused to make the said statements. In this connection, reliance was placed by the learned counsel appearing for the appellants on the judgments of this court in *Shankar Raju Banglorkar v. State of Goa, 1992(2) Bom.C.R. 169* and *Deoraj Deju Suvarna and etc. v. State of*

Maharashtra, 1994 Cri.L.J. 3602. In *Shankar Raju' scase (supra)*, it was argued that the accused was handcuffed at the time when he expressed his willingness to show where the charas has been kept in his house and, hence, the disclosure was made under duress and threat given by the police and, therefore, that discovery was not admissible in law in terms of Article 20, Part III of the Constitution of India. That contention was accepted by this court. Similar view was taken by this court in *D.D. Suvarna' scase (supra)*. In our opinion, these judgments must be confined to the facts of those cases and are not applicable to the peculiar facts of this case. In this case A-1 and A-3 were absconding. They were arrested on 30/8/1998 and 29/8/1998 respectively. It is perhaps because of this that they were required to be handcuffed. That does not mean that they were coerced and threatened to make the statement. There is no evidence to that effect. We reject this submission.

25. It was contended by Mr. Desai that the weapons seized at the instance of A-1 and A-3 were not sealed. There is no evidence of sealing. Similarly clothes of the deceased were also not sealed. Relying on the judgment of this Court in *Lalchand Cheddilal Yadav vs. State of Maharashtra, 2000 (2) All M.R. (Cri) 1485*, it was contended that once the factum of sealing becomes doubtful, the possibility of blood being smeared on the articles prior to they being

sent to the chemical analyst cannot be ruled out. Therefore, no reliance can be placed on the discovery evidence. Finding of human blood on the said articles cannot be relied upon by the prosecution.

26. In this case, so far as discovery of knife at the instance of A-1 is concerned, the prosecution has examined PW-12 Firoz. He has stated that on 4/9/1998 A-1 made a statement that he would show the weapon which he had kept in his house. His statement was recorded under panchanama (Ex-36). He led the police and the panchas to his house and took out a knife which he had kept in his house. According to PW-12 Firoz that knife (article 5) was then sealed in a brown paper. Labels with his signature thereon and the signatures of other panchas were affixed on the said packet. He has identified his signature on the label which is marked as Ex-37. In the panchanma (Ex-36-A), it is stated that the knife was wrapped in khakhi paper and a paper label having signatures of panchas was affixed thereon. There is no challenge to the sealing in the cross-examination of this witness. PW-16 PI Hargude has reiterated that knife (article 5) was kept in a brown paper, a label was put on it and it was sealed. In cross-examination, there is no challenge to his statement that the knife was sealed.

27. So far as the seizure of gupti (article 4) at the instance of A-3 is

concerned, the prosecution has examined PW-8 Mohd. Zakir. PW-8 Mohd. Zakir has said in his evidence that on 7/9/1998, A-3 made a statement that he would show the weapons which he had concealed in his house. That statement was recorded under panchanama (Ex-27). He led the police and the panchas to his house and took out a gupti from under the kitchen platform. The said gupti was seized under panchanama (Ex-27-A). He has stated that the said gupti (artice 4) was wrapped in brown paper. A label bearing the signatures of panchas was affixed on it. The gupti was duly sealed. This witness has not been cross-examined at all. Therefore, there is no challenge to the factum of sealing. In the panchanama (Ex-27-A) it is stated that the gupti was wrapped in a brown paper and a label bearing signatures of the panchas was affixed thereon. PW-16 PI Hargude has stated in his evidence that the gupti was sealed. There is no challenge to the sealing in his cross-examination.

28. The prosecution has examined PW-7 Vasant. He has stated that on 10/9/1998, A-3 made a statement that he would show clothes which he had concealed in the house of his grandfather. That statement was recorded at Ex-24. He led the police and the panchas to the house of his grandfather and took out clothes from beneath the almirah. The clothes were seized under panchanama (Ex-24-A). PW-7 Vasant has stated that the clothes were packed with a brown colour

wrapper. His signature was obtained on the label. The label with his signature thereon was affixed on the brown colour wrapper. There is no challenge to this statement in the cross-examination of this witness. In the panchanama (Ex-24-A), it is stated that all clothes were separately packed in a khaki wrappers and signatures of panchas were taken on the labels affixed thereon. PW-16 PI Hargude has reiterated that the clothes were sealed and the labels were pasted on the wrappers. There is no challenge to this statement in the cross-examination.

29. So far as the seizure of clothes of the deceased is concerned, the prosecution has examined PW-5 Noor Mohd. He has stated that on 20/8/1998 clothes of the deceased were taken charge of under panchanama (Ex-20). He has stated that the police packed those clothes in a brown colour paper wrapper. The police put a label thereon with their signatures. The packet was then sealed with a substance like wax. This witness has not been cross-examined at all. Therefore, there is no challenge to the sealing of clothes of the deceased. PW-16 PI Hargude has in his evidence reiterated that the clothes of the deceased were sealed and labels were pasted on the wrappers. There is no challenge to this statement.

30. The chemical analyst's report (Ex-63) states that his office

received "nine sealed parcels, seals intact and as per copy sent". The chemical analyst's report indicates that the parcels were sealed. Besides, the defence has not challenged the sealing. Some of the pancha witnesses have not been cross-examined also. In the circumstances, in our opinion, the accused cannot draw any support from the judgment of this court in *Lalchand Yadav' scase (supra)*. That judgment must be confined to its own peculiar facts. We, therefore, reject this submission.

31. In the view that we have taken, we are of the opinion that A-2 must be given benefit of doubt and ordered to be released. The conviction and sentence of A-1 and A-3, however, must be confirmed. Hence, we pass the following order.

ORDER

"The conviction and sentence of accused 2 Sajidali Nisar Ahmed Ansari under the impugned judgment and order is quashed and set aside. He is ordered to be released forthwith unless required in any other case. Conviction of accused 1 Nisar Ahmed @ Matya Mohd. Yasin Ansari and accused 3 Mohd. Javed @ Banti

Nisar Ahmed Ansari under section 302 read with section 34 of the IPC and their sentence of life imprisonment and fine of Rs.5,000/- each is confirmed. Appeal is disposed of in the aforestated terms."

(SMT. RANJANA DESAI, J.)

(D.G. KARNIK, J.)